[illegible]

[illegible] Court of the United States

[illegible] Term, 1990

STATE OF CONNECTICUT
JOHN F. DIGIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT

[illegible]
(Counsel of Record)
[illegible]
[illegible] CT 06511
[illegible]

[illegible]
[illegible] Litigation Group
[illegible]
[illegible] N.W.
[illegible] D.C. 20036
[illegible]

[illegible] for Respondent

[illegible]

BEST AVAILABLE COPY

QUESTION PRESENTED

May a State, consistent with the Due Process Clause, deprive an individual of the full use and enjoyment of his home, by authorizing a $75,000 public attachment on his real property at the request of a private party who has no prior interest in the property, without predeprivation notice or opportunity to be heard, without requiring the attaching plaintiff to post a bond, and without any showing of special need or other extraordinary circumstances?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

In March, 1988, pursuant to a subsection of Connecticut's Prejudgment Remedy (PJR) law, Conn. Gen. Stat. § 52-278e(a)(1), petitioner DiGiovanni attached respondent Doehr's home based on an ex parte application and affidavit submitted "on the papers." As authorized by the statute, he effected the attachment before the inception of his civil lawsuit against Doehr for assault and battery.[1] The lawsuit did not involve the attached real estate; DiGiovanni had no preexisting interest in Doehr's home or in any other property owned by Doehr.

Doehr had no prior notice or opportunity to be heard before his property was attached. DiGiovanni did not, and was not statutorily required to, post a bond for damages in the event the attachment was wrongful.

The PJR application recited DiGiovanni's intention to commence a lawsuit and sought an attachment of $75,000. No facts whatsoever were provided to support that amount. J.A. 24A.

DiGiovanni sought the ex parte attachment solely on the ground that the "remedy requested is for an attachment of real property." J.A. 23A; *see* Conn. Gen. Stat. § 52-278e(a)(1). DiGiovanni did not allege that Doehr would not, or could not, pay any eventual judgment. In short, he did not even show that he needed the security

---

[1] Petitioners are mistaken in describing the attachment as having been obtained at the same time as the action was commenced. In Connecticut, an action is commenced when the suit is served. *Young v. Margiotta*, 136 Conn. 429, 433, 71 A.2d 924 (1950).

of an attachment, nor did he allege such exigent circumstances as would permit an ex parte PJR under Conn. Gen. Stat. § 52-278e(a)(2), a subsection not at issue in this case.

The ex parte affidavit recited, in conclusory fashion, only DiGiovanni's one-sided version of the underlying facts. The affidavit, dated March 16, 1988, asserted that three days earlier, "I was willfully, wantonly and maliciously assaulted by the defendant . . . . Said assault and battery [caused a broken wrist and bruised eye]. . . . I have . . . expended sums of money for medical care and treatment. . . . In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." J.A. 24A.

The affidavit does not reveal such pertinent considerations as whether DiGiovanni provoked the altercation; whether either party was arrested in connection with the incident; or whether Doehr was also injured and could assert a counterclaim.

Ordinarily, upon presentation of an application for attachment, the clerk checks the papers for proper form and presents them to a judge for signature. On March 17, 1988, a judge signed the order that had been presented to the clerk by DiGiovanni which contained little more than the pro forma recital, "[I]t is found that there is probable cause to sustain the validity of the plaintiff's claim, [and] that the application should be granted ex parte because the prejudgment remedy requested is for an attachment of real property." J.A. 26A.

The sheriff attached the property on March 21; only after attaching his property did he make service on

Doehr. The complaint had a "return date" of a month later, April 19, 1988, J.A. 27A, the date when the defendant must appear and when pleadings and discovery may begin. That April 19 date was thus the first procedural opportunity for Doehr to move for a post-attachment hearing on the March 21 PJR. Before April 19, Doehr could challenge the attachment only by bringing a separate action with an order to show cause, necessarily incurring the expense of a separate filing fee and sheriff's fee.

As more fully described in petitioner's Statement of the Case, Doehr subsequently brought suit against DiGiovanni in the United States District Court for the District of Connecticut, alleging that his constitutional rights to due process and equal protection had been violated. J.A. 4A.

The district court ruled that Connecticut's PJR statute satisfied due process. *Pinsky v. Duncan*, 716 F. Supp. 58 (D. Conn. 1989). Doehr appealed, and prevailed in a divided opinion. *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990).

SUMMARY OF ARGUMENT

Connecticut General Statutes § 52-278e(a)(1) is a unique prejudgment remedy (PJR) law because it enables a private plaintiff to deprive a potential defendant of the full enjoyment and use of his fundamental interest in the full ownership, use and disposition of real property by an attachment (1) without prior notice; (2) without predeprivation opportunity to be heard; (3) without posting a

bond to indemnify the defendant for any damage that he may suffer if the attachment is wrongful; (4) without any preexisting interest in the property; (5) when there are no exigent circumstances; and (6) with no guarantee of a prompt post-attachment hearing.

Because the attachment, pursuant to Conn. Gen. Stat. § 52-278e(a)(1), is predictable and because prior notice and hearing are eminently feasible, predeprivation process is the constitutional norm. *E.g., Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 990 (majority opinion); *accord* at 995-96 (dissenting opinion) (1990).

The right to transfer, or use the equity in, real property is a fundamental right. An attachment deprives the owner of significant and valuable incidents of ownership. Title becomes unmarketable, and any equity in the property becomes unavailable for use as security for home equity loans or lines of credit needed to meet essential family expenses, such as paying a lawyer, basic home maintenance, replacing an old car, paying tuition, or meeting medical expenses. Thus, an attachment lien can cause significant financial, physical, and emotional injury to the property owner, and to his or her dependents.

In these circumstances, predeprivation notice and opportunity to be heard is essential. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

No prior decision of this Court sanctions a PJR statute like Connecticut's. The case chiefly relied on by petitioners, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), is distinguishable because it involves both a claim based on

a prior interest in the property and a statute requiring the plaintiff to post a bond.

The balancing test enunciated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), mandates predeprivation notice and opportunity to be heard. The State has no interest in a private dispute; the plaintiff has no preexisting interest in defendant's property; the risk of an erroneous deprivation is considerable; and protecting a defendant's interest in his own real property is compelling. This case does not involve extraordinary circumstances requiring special protection to a state or creditor interest. The postdeprivation opportunity to litigate the wrongfulness of the attachment is tenuous at best, and wholly different from predeprivation protections designed to reduce the risk of erroneous deprivation, such as a bond.

Because the Connecticut law allows no predeprivation notice or hearing when the property to be attached is real estate, and because it does not require a bond to minimize the risk of erroneous deprivation, Conn. Gen. Stat. § 52-278e(a)(1) deprives the homeowner of due process.

ARGUMENT

CONNECTICUT'S EX PARTE ATTACHMENT LAW VIOLATES DUE PROCESS

I. THE ATTACHMENT DEPRIVES THE OWNER OF FUNDAMENTAL, CONSTITUTIONALLY PROTECTED, RIGHTS IN REAL PROPERTY

An attachment of real property is a serious infringement on a basic civil right: the right to use, enjoy, own, and dispose of property. *Sheiley v. Kraemer*, 334 U.S. 1, 10 (1948); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1972).

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, *a home*, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Id. at 552 (emphasis added).

Petitioners suggest that, because respondent could still live in his home, the deprivation of property was insignificant. But that view seriously understates the effect of an attachment on real property. "Attachment . . . is tantamount to an involuntary dispossession of the defendant prior to any adjudication of the rights of the plaintiff – an execution, so to speak, in advance of trial and judgment." Annotation, *Wrongful Attachment – Damages*, 45 A.L.R. 2d 1221 (1956).

"[R]eal estate attachments are critical encumbrances which materially impact upon the marketability of title." Widem, *Connecticut Real Estate Practice After Pinsky v. Duncan*, 1 Conn. Lawyer 9 (1990); *see Frank Towers Corp. v. Laviana*, 140 Conn. 45, 52-53, 97 A.2d 567, 571 (1953). Any transferee of the property takes subject to the lien. *City National Bank v. Traffic Engineering Assoc.*, 166 Conn. 195, 200-01, 348 A.2d 637 (1974); upon foreclosure, an attaching plaintiff gets paid, even if his claim is not reduced to judgment. Conn. Gen. Stat. § 49-27. If the defendant prevails, he has to sue to get his money back.

"A prejudgment attachment may deprive a litigant of a significant property interest for weeks, months, or years, depending on the complexity of the case and the backlog of the court's docket." *Diane Holly Corp. v. Bruno & Stillman Yacht Co.*, 559 F. Supp. 559, 561 (D.N.H. 1983). *See also Gerardi v. Statewide Ins. Co.*, No. N-86-266 (EBB) (D. Conn.) (lodged with the Clerk of this Court) (22 months to get hearing).

Prejudgment attachment is a remedy unknown to the common law, *Ledgebrook Condominium Ass'n v. Lusk Corp.*, 172 Conn. 577, 582, 376 A.2d 60 (1977), and unavailable in equity. *De Beers Mines v. United States*, 325 U.S. 212, 222-23 (1945); *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988); High, *Injunctions* § 326 (4th ed. 1905) ("Any other rule than this would lead to unnecessary and often fruitless interruption of property rights by creditors at large whose demand might be utterly unfounded in law and incapable of being established by judgment").

Early PJR statutes were devised to obtain jurisdiction over nonresidents, but even that purpose is now circumscribed by due process considerations. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("[T]raditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage").

While an attachment does not inevitably interfere with the right to occupy the property, it does interfere with the right to use the equity in the property (to finance one's defense, to pay for home repairs, education, medical expenses, to buy a car, to move up to a more expensive home) and to dispose of the property. The Constitution protects all the essential attributes of property, including the right to use and dispose of it. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

"Maintenance of a lien upon property is not a negligible deprivation (citing *Sniadach*). . . . " *West v. Zurhorst*, 425 F.2d 919, 920 (2d Cir. 1970). *See also Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988) (the judgment lien impaired the owner's ability to mortgage or alienate the property; "state procedures for creating and enforcing such liens are subject to the strictures of due process"). *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (even when the taking deprives the owner of only a nonpossessory interest, such as the right to mortgage or sell, it is qualitatively more severe when the taking is by a stranger).

In 1971, only six states allowed non-emergency ex parte PJR attachments of real property. Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L. Rev. 701 n.1, 707 n.40 (1980). Now, Connecticut stands alone, undoubtedly because ex parte attachments of real property in non-emergency situations have been held unconstitutional in numerous cases. *E.g., Clement v. Four North State Street Corp.*, 360 F. Supp. 933 (D.N.H. 1973); *Idaho First Nat. Bank v. Rogers*, 41 U.S.L.W. 2492 (Idaho Dist. 1973); *Bay State Harness Horse Ass'n v. P.P.G. Ind.*, 365 F. Supp. 1299 (D. Mass. 1973); *Higley Hill, Inc. v. Knight*, 360 F. Supp. 203 (D. Mass. 1973); *Gunter v. Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Me. 1973); *Terranova v. Avco Financial Services*, 396 F. Supp. 1402, 1407 (D. Vt. 1975); *Briere v. Agway, Inc.*, 425 F. Supp. 654 (D. Vt. 1977); *MPI, Inc. v. McCullough*, 463 F. Supp. 887 (D. Miss. 1978); *McIntyre v. Associates Financial S. Co.*, 367 Mass. 708, 328 N.E.2d 492, 494 (1975). *Cf. Gonzales v. County of Hidalgo*, 489 F.2d 1043 (5th Cir. 1973) (landlord-tenant).[2]

---

[2] Petitioners or amici cite a few cases which decline to find that attachment of real property affects a constitutionally protected interest. Those cases concern either a preexisting interest in the property or significantly different statutes, which include protections to minimize the risk of wrongful deprivation lacking in Connecticut's PJR statute, such as a bond or exigent circumstances. *E.g., Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975) (statute requires the attaching plaintiff to post a double bond and permits an ex parte attachment only in extraordinary circumstances); *see Thompson v. De Hart*, 84 Wash. 2d 931, 530 P.2d 272 (1975) (plaintiff must show a need for prompt action); *cf. Stone v. Godbehere*, 894 F.2d 1131, 1134 (9th Cir. 1990) ("A restraining

(Continued on following page)

A home is the biggest investment in a person's life, both financially and psychologically. "No property is more sacred than one's home. . . . " *Sentell v. New Orleans R. Co.*, 166 U.S. 698, 704-05 (1897); *Payton v. New York*, 445 U.S. 573, 585, 589-90, 597 n.45, 601 & n.54, 615 (1980). The ability to occupy one's home is only one of the fundamental incidents of ownership which the Constitution protects. The home has long been given special protection by the Court in connection with seizure; a nonpossessory taking, such as an attachment, is a form of seizure. *See Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972); *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 399 N.E.2d 1286, 1289 (1980); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Even when there is a seizure by the government itself, to effectuate an important public purpose rather than for merely private advantage, the homeowner is entitled to prior notice and an opportunity to be heard. *E.g., United States v. The Premises at Livonia*, 889 F.2d 1258

(Continued from previous page)

order prohibiting the alienation of property does impose a significant injury"). Also, *Bustell v. Bustell*, 107 Mont. 457, 555 P.2d 722 (1976), *appeal dismissed*, 430 U.S. 925 (1977) (statute limited to contract actions, and required a double bond); *cf. First Bank Western Montana v. Gregoroff*, 770 P.2d 512 (1989) (a prehearing seizure may be obtained only under circumstances which indicate the plaintiff's remedy would be seriously impaired).

The cases cited by petitioners or amici simply do not stand for the proposition that a real property owner is relegated to second class citizenship when it comes to due process protections.

(2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990) (per curiam) (occupancy agreement); *United States v. Parcel I. Beginning At a Stake*, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990) (occupancy agreement) ("Most importantly, the governmental interest in providing minimal due process is, in the balance, scant when compared with the claimants' overriding interest in their homes"); *United States v. Property at 850 S. Maple*, 743 F. Supp. 505, 510 (E.D. Mich. 1990) (leasehold; occupancy agreement after eviction); *United States v. Premises Located at Highway 13/5*, 747 F. Supp. 641 (N.D. Ala. 1990) (occupancy agreement).

> "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . "

Boyd v. United States, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765)), cited in *Silverman v. United States*, 365 U.S. 505, 512 (1961).

Because property ownership is a basic civil right, the owner is entitled to due process before being deprived of any interest in that property. As discussed below, that process is not provided by Connecticut law.

II. CONNECTICUT LAW DENIED RESPONDENT DUE PROCESS

A. Basic Due Process Requirements Enunciated by the Court's Prior Decisions Have Not Been Met.

As set forth above, the attachment deprived respondent of constitutionally protected interests in owning,

using the equity in, and disposing of, his property. The question then becomes what process was due before that deprivation took place. The general rule is that, except in truly unusual circumstances, due process requires notice of the proposed deprivation before it takes place, and an opportunity to be heard before the deprivation. *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

This Court has consistently held that, when a deprivation pursuant to an established state procedure is predictable, rather than unanticipated, and it is possible to provide prior notice and hearing, the State must do so. *E.g., Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 990 (majority), 995-96 (dissent) (1990); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Parratt v. Taylor*, 451 U.S. 527, 537-38 (1981). Petitioners do not, and cannot, claim that a prior hearing is impracticable, especially since Connecticut has afforded notice and hearing for real property attachments since the decision below, *see* Amicus Brief at 15, and has long done so when the attachment is for personalty in nonexigent circumstances. Conn. Gen. Stat. § 52-278d.

Due process normally requires some opportunity to respond before the deprivation. *Memphis Light, Gas & Water Div.*, 436 U.S. 1, 16 (1978); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("[T]he right to a prior hearing . . . is the only truly effective safeguard against arbitrary deprivation of property"). *E.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) ("a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of

the relevant supporting evidence. If the [affected party] is not provided this information, the procedures . . . contain an unacceptable risk of erroneous decision").

Some of this Court's decisions allow delaying a full evidentiary hearing temporarily, (1) when there are at least some predeprivation administrative procedures, (2) where there is a substantial governmental interest, and (3) the risk of erroneous deprivation is low. Even those decisions require that the person being deprived of a property or liberty interest receive advance notice of the claims and the substance of the supporting evidence before even a temporary deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 339 (1976) (notice and extensive paper hearing before deprivation).[3]

Except in truly unusual circumstances, not present here, surrounded by safeguards to minimize the risk of wrongful attachment, not present here, this Court has never sanctioned a judicial ex parte deprivation. The seminal ex parte attachment cases are, of course, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); and *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601 (1975).

Sniadach involved a personal debt on a promissory note and the ex parte deprivation, by garnishment, of the use of $31.59 in wages deposited in a bank account. In

---

[3] The "temporary" deprivation in most PJR cases continues for several years while the case wends its way to the top of the trial list on Connecticut's crowded dockets.

Sniadach, as here, the plaintiff had no preexisting interest in the property attached. In *Sniadach*, unlike this case, the creditor had to post a bond before garnishment. Nonetheless, this Court declared the Wisconsin statute unconstitutional because, as here, there was "no situation requiring special protection to a state or creditor interest," and the statute was not "narrowly drawn to meet any such unusual condition." *Sniadach*, 395 U.S. at 339. Prior notice and an opportunity to be heard on the validity of the underlying claim was held essential to due process in the absence of a vital government interest.

Fuentes involved a private debt secured by household goods bought under a conditional sales contract, which the creditor sought to replevy ex parte. Unlike this case, the creditor had a preexisting interest in the property and the creditor had to post a bond for "the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ" if the debtor prevailed. *Fuentes*, 407 U.S. at 567 n.7.

But, once again, the statute was found unconstitutional for failure to provide advance notice and an opportunity to be heard. "The minimal deterrent effect of a bond requirement . . . is no substitute for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property." *Fuentes*, 407 U.S. at 83. "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Fuentes*, 407 U.S. at 86. The *Fuentes* court emphasized that the danger of a substantively unfair or mistaken deprivation of property "is especially great when the State seizes

goods simply upon the application of and for the benefit of a private party." *Fuentes*, 407 U.S. at 81, 92-93.

Mitchell likewise involved a private debt secured by household goods bought under a conditional sales contract, which the creditor sought to replevy ex parte. Unlike this case, however, the creditor had a preexisting interest in the property, and it had to post a bond to compensate for deprivation of use of the property, injury to social standing or reputation, humiliation and mortification, and attorneys fees. *Mitchell*, 416 U.S. at 606 & n.6. In upholding the replevin, the Court repeatedly stressed the importance of the bond in the statutory scheme. *Id.* at 608, 610, 617, 618, 619. Moreover, unlike this case, the creditor filed a detailed affidavit as to the amount claimed, and as to its preexisting interest in the property. The statute allowed replevin only when the plaintiff claimed an interest in the property, and when it was within the power of the defendant to conceal or dispose of the property, and thereby deprive the plaintiff of his preexisting interest in the property.

Mitchell pointedly distinguished *Sniadach* as a case where the suing creditor "had no prior interest in the property attached." *Mitchell*, 416 U.S. at 614. Again, "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditor, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property. . . . Resolution of the due process question must take account

not only of the interests of the buyer of the property but those of the seller as well." *Mitchell*, 416 U.S. at 604.

The Court summarized its reasons for taking the unusual step of dispensing with the ordinary strictures of due process: "Here, the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss." *Mitchell*, 416 U.S. at 619. At least two of those factors are not present here: the prospective plaintiff had no interest in Doehr's property, and if the attachment is wrongful, the statute does not require a bond to protect Doehr against loss.

Calero-Toledo involved the nonjudicial ex parte seizure of a yacht by the government to prevent its use for unlawful purposes (transportation of drugs). The Court reaffirmed *Fuentes'* view that only in limited circumstances is seizure without an opportunity for prior hearing permissible. 416 U.S. at 678. Such circumstances were met there because the seizure was directly necessary to secure an important governmental interest; there was a special need for very prompt action; and the person initiating the seizure was a government official responsible for determining, under a narrowly drawn statute, that the seizure was necessary and justified. *Calero-Toledo*, 416 U.S. at 679. *See also, e.g., North American Cold Storage v. Chicago*, 211 U.S. 306 (1908); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

Plainly, real estate and yachts present very different circumstances; both do not require prompt action. Real property cannot be moved, concealed or destroyed. While

real property can be transferred, such transfers usually involve releases of existing mortgages and creation of new ones, a process which does not take place overnight. Moreover, a real property transfer can readily be traced on the public records. To deter such a transfer, a creditor can assert fraudulent transfer as a count in his tort or contract action. *Murphy v. Dantowitz*, 142 Conn. 320, 114 A.2d 194 (1955). In addition, a defendant would be well-advised not to transfer the real property, since the transfer is admissible against him to show his consciousness of liability. *Batick v. Seymour*, 186 Conn. 632, 433 A.2d 471, 473 (1982).

Most fundamentally, if Connecticut simply provides a prompt *pre*deprivation hearing before attachment of realty, as it does for all other nonexigent attachments, Conn. Gen. Stat. § 52-278d, the risk of interim transfer would be negligible.

Di-Chem involved a commercial debt for goods sold and delivered. The creditor garnished a bank account ex parte, based on an affidavit that it needed the garnishment to protect against loss. Even though the creditor posted a bond in double the amount of the debt, that did not save the statute. The Court noted that where the creditor did not have a preexisting interest in the bank account, the probability of irreparable injury to the debtor "is sufficiently great so that some procedures are necessary to guard against the risk of initial error." *Di-Chem*, 419 U.S. at 608.

In summary, this Court has viewed postdeprivation process as adequate only in limited circumstances not present in this case: an important governmental interest

such as a danger to health and safety, or a strong preexisting interest of the plaintiff in the attached property itself; danger of destruction or concealment of the plaintiff's property interest; a narrowly drawn statute; *and* a bond (or government liability) to protect against an erroneous deprivation.

As respondent now demonstrates, in the context of a purely private dispute, where there is no exigency and the plaintiff has no preexisting interest in the property, the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), mandates advance notice and opportunity to be heard, before real property can be liened to secure a potential judgment.

B. Under the Balancing Test, Respondent was Denied Due Process.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court set forth the factors to be considered when deciding what due process requires:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews held that a predeprivation judicial-type adversarial hearing was not mandated by due process before adverse administrative action, because elaborate predeprivation procedures "provide[d] the claimant with an effective process for asserting his claim prior to any administrative action. . . . " *Id.* at 349. *Cf. King v. Mullins*, 171 U.S. 404, 429-30 (1898) (summary remedies which can be used in the collection of taxes "could not be applied in cases of a judicial nature").

The *Mathews* factors as applied to judicial deprivation overwhelmingly favor predeprivation notice and opportunity to be heard, rather than the ex parte real property attachment in Connecticut's PJR statute.

Private interests of the plaintiff and the defendant. The property owner's interest in his home is "overriding." *United States v. Parcel I. Beginning At a Stake*, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990). Prejudgment attachment of real property can significantly impair the owner's ability to transfer the property or to borrow against it to pay for legal representation. In addition, it may trigger a default clause in the first or second mortgage on the property, precipitating other legal actions and financial difficulty. It may also impair the owner's credit or ability to refinance the property (for necessary repairs, improvements, or even to pay off debts), thereby relegating the homeowner in need of funds to dealing with high interest lenders eager to take advantage of his difficult position.

The Connecticut statute also imposes additional financial burdens on the property owner. It requires the owner either to take affirmative action to eliminate or reduce the attachment, or otherwise challenge its validity,

through a lawyer, or to suffer an invalid or excessive attachment if he can't afford to fight it. Even if the plaintiff readily obtains an undisputed judgment, the inevitable result of a PJR is to increase the size of the judgment by the amount of the sheriff's attachment fees. *Cf. In re Smith*, 866 F.2d 576, 585 (3d Cir. 1990) (advance notice enables a debtor to avoid costs involved in a lawsuit).

Unlike *Mitchell*, where the plaintiff had a prior interest in the property, the private interest of the property owner far outweighs the private interest of a plaintiff who has no consensual security interest in the property. *Garrison Memorial Hospital v. Rayer*, 453 N.W.2d 787 (N.D. 1990); *Olson v. Ische*, 330 N.W.2d 710, 712 (Minn. 1983). A potential plaintiff has no legitimate interest in an ex parte attachment of property just because it is real property. Real estate does not generally diminish in value over time and is not readily concealed. If the plaintiff is concerned about a threatened fraudulent transfer of the property, the procedures of Conn. Gen. Stat. § 52-278e(a)(2), allowing attachment in various exigent circumstances, are available.

But in the ordinary case, a plaintiff has no legitimate interest in a defendant's real estate before getting a judgment. What is really at issue here, as amici's brief makes clear, is the desire to use the PJR to pressure the debtor to pay a disputed claim. Comment, *Attachment*, 22 Stan. L. Rev. 1254, 1260-61 (1970) (even attachments with no economic value, because prior liens exceed the equity, may cause defendants to sacrifice valid defenses and counterclaims under great pressure to get the lien released, and to settle for more than the plaintiff could get at trial). While that surely is a plaintiff's interest, it is just as

surely not a legitimate one. Indeed, public policy strongly favors the right of a consumer to freely dispute an alleged debt. *E.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692g; Billing Error Act, 15 U.S.C. § 1666; Fair Credit Reporting Act, 15 U.S.C. § 1681i; Conn. Gen. Stat. § 42-84a (billing error act); Conn. Reg. State Agencies § 36-243c-5(n), a regulation adopted under the Creditors' Collection Practices Act, Conn. Gen. Stat. § 36-243a.

Accordingly, the first factor, the private interests of the plaintiff and the defendant, weighs heavily against petitioners' position.

The risk of erroneous deprivation under current procedures and the probable value of additional safeguards. The purpose of due process is to reduce the risk of erroneous decisions. *Mathews*, 424 U.S. at 344. "Under the Due Process Clause . . . the Court has recognized that predeprivation process is of 'obvious value in reaching an accurate decision,' that the 'only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect,' . . . and that predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1984).

Here, however, the one-sided, self-interested affidavit submitted to obtain an ex parte attachment does not significantly reduce the risk of erroneous deprivation. *Fuentes*, 407 U.S. at 81, 83; *Di-Chem*, 419 U.S. at 608. In *Mathews*, 424 U.S. at 343-44, this factor was crucial: In circumstances where "a wide variety of information may be deemed relevant, and issues of witness credibility and

veracity often are critical to the decisionmaking process. . . . 'written submissions are a wholly unsatisfactory basis for decision' " (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). Confrontation is especially important when a dispute rests upon "the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance. . . . " *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

The only arguable predeprivation "safeguards" in the Connecticut statute are the ex parte affidavit and the pro forma judicial participation in authorizing the attachment. In these circumstances, the balancing test favors a predeprivation hearing overwhelmingly. The test favors additional safeguards, as well, because a closer look shows that Connecticut's PJR statute is so inadequate as to encourage, rather than deter, abuse.

First, when it acts on a self-serving ex parte affidavit, "The State acts largely in the dark." *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972). What is more, under the Connecticut statute, the only affidavit required for an ex parte attachment is the general statement "that there is probable cause to sustain the validity of plaintiff's claim." Conn. Gen. Stat. § 52-278e(a). This is unlike Conn. Gen. Stat. § 52-278c(2), for noticed attachments, which requires an affidavit "setting forth a statement of facts sufficient to show that there is probable cause." As a result, the ex parte affidavit tests only the plaintiff's belief as to the strength of his case, *Fuentes*, 407 U.S. at 83, which does nothing to minimize the risk of erroneous deprivation.

Second, the statute contains many built-in delays which preclude the early hearing which petitioners admit is essential to its constitutional validity. Petitioners' Brief at 19, 20. There are no time constraints requiring a prompt post-attachment hearing. An attaching plaintiff need not serve the defendant promptly after attachment, or even file the case in court for at least ninety days. Conn. Gen. Stat. § 52-278j. To dissolve an attachment when the case has not been filed in court, the attached party must file a separate action and seek an order to show cause, incurring filing fees, sheriff fees, and attorney's fees.

Moreover, by law, *at least twelve days* must elapse between service on the defendant and the "return date" when pleadings may commence. Conn. Gen. Stat. § 52-46. Assuming that the case is promptly filed in court, the statute states only that the post-attachment hearing shall be held "expeditiously." The standard is imprecise. Generally the court takes at least two weeks to schedule a hearing; in districts with crowded dockets it can take much longer, as amici recognize. Amicus Brief at 15. One defendant finally resorted to filing a federal action after twenty-two months of not being able to get a hearing. *Gerardi v. Statewide Ins. Co.*, Civil No. N-86-266 (EBB) (D. Conn.) (lodged with the Clerk herein).

A decision on appeal is not as "immediate" as petitioners contend. An appeal could take months, at additional cost to the defendant. The issue on appeal is whether the trial court's decision is clearly erroneous, a substantial barrier to success. *Banks v. Vito*, 19 Conn. App. 256, 562 A.2d 71 (1989).

Third, the post-attachment hearing is strictly limited to "probable cause to sustain the validity of plaintiff's claim." Conn. Gen. Stat. § 52-278e(b), (c). Defendant cannot, for instance, dispute the existence of the exigent circumstances listed in subsection (a)(2) of the statute; or contend that he is insured or otherwise ready, willing, and able to pay any judgment without coercion; that the attachment is excessive; or that it is otherwise unconstitutional. Conn. Gen. Stat. §§ 52-278d, 52-278e(c).[4]

Postdeprivation hearings are rarely requested because they generally only add a layer of costs (attorneys fees) and, when sought, are rarely successful. Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buffalo L. Rev. 459, 460, 482, 484 (1978). As this Court has observed, "The 'only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect.'" *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1984) (quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985)).

Fourth, the PJR statute does not require judicial determination of probable cause unless the defendant asks for a hearing after the attachment is imposed. Conn. Gen. Stat. § 52-278e(c); *Self-Service Sales Corp. v. Heinz*, 1 Conn.

---

[4] DiGiovanni sought a $75,000 attachment, three days after he was injured, although he was well enough to retain a lawyer and sign an affidavit. For cases tried to a jury, "When only trials in which the plaintiff won are studied, 50% of the awards are under $17,500 and 75% are under $50,000." Jackson, Superior Court Tort Jury Trial Study 15 (1987). The attachment against Doehr in this case, on average, appears to be well in excess of plaintiff's potential recovery.

App. 188, 192, 470 A.2d 701 (1984). As one court said, in invalidating a statute like Connecticut's, "The judge's only duty with respect to the issuance of the writ is to sign it. Only after a writ has been issued is a judge afforded any opportunity for the exercise of judicial discretion." *Garrison Memorial Hospital v. Rayer*, 453 N.W.2d 787, 792 (N.D. 1990). Rarely will a judge, before signing the order, modify the amount of the attachment requested. Conn. Gen. Stat. § 52-278k.

Fifth, an attaching plaintiff's burden of proof is so minimal as to provide no protection against erroneous deprivation. The plaintiff does not have to establish that he will prevail. *Dow & Condon, Inc. v. Anderson*, 203 Conn. 475, 479, 525 A.2d 935 (1987). *Compare Diane Holly Corp. v. Bruno & Stillman Yacht Co.*, 559 F. Supp. 559, 561 (D.N.H. 1983) (burden to prove that plaintiff will ultimately prevail by more than a mere preponderance of the evidence) *with Ledgebrook Condominium Ass'n v. Lusk Corp.*, 172 Conn. 577, 584, 376 A.2d 60 (1977) (burden of proof not as demanding as proof by fair preponderance).

The plaintiff must merely establish that he has a good faith belief that he has a viable claim. Probable cause "does not demand that a [plaintiff's] belief be correct or more likely true than false." *Anderson v. Nedovich*, 19 Conn. App. 85, 88, 561 A.2d 948 (1989). DiGiovanni met that minimal standard by asserting, "*In my opinion*, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." J.A. 24A (emphasis added). The standard virtually eliminates proof of liability as a factor to consider, contrary to due process principles. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

Sixth, the statute provides for modification of the attachment only upon the same grounds as could have been asserted in the postdeprivation hearing, that is, absence of the minimal standard of probable cause. Conn. Gen. Stat. § 52-278k. A court may not release the attachment, except on statutory grounds: want of probable cause, failure to return the complaint to court, or substitution of a defendant's bond. *Morris v. Timenterial, Inc.*, 168 Conn. 41, 357 A.2d 507 (1975).

Seventh, the defendant's bond is, itself, a deprivation of property. *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972); *Anderson v. Barnett First Nat. Bank*, 60 F.R.D. 104, 105 (M.D. Ala. 1973). A defendant's bond, to substitute for the attachment, *see* Conn. Gen. Stat. § 52-304, provides little realistic relief for a homeowner who is unable to post it without giving the bonding company a lien on the property, in addition to paying the ten per cent premium. *See De Beers Mines v. United States*, 325 U.S. 212, 222 (1944). "[U]nless the defendant has substantial assets, the bonding company will probably insist that he post security equal to the amount of the bond. Thus, filing an undertaking may serve merely to change the holder of the frozen assets, not free them up." Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 Brooklyn L. Rev. 199, 235 (1978). *See also Lucas v. Stapp*, 6 Wash. App. 971, 497 P.2d 250, 252 (1972) (seizure of property before judgment in a contract action violates due process; "The fact that he could regain possession by acceding to the monetary demands of Lucas or by posting a redelivery bond does not alter the character of that deprivation").

Eighth, Connecticut's real property PJR statute is not limited to narrowly drawn exigent circumstances essential to protect a state or creditor interest. In 1972, this Court held that, absent "truly unusual" circumstances, a hearing is required before a person can be deprived of property. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). Accordingly, ex parte prejudgment attachments are almost universally limited to extraordinary circumstances, recognized in *Mitchell*, 416 U.S. at 608, as providing a safeguard which minimizes the risk of wrongful attachment. *See, e.g. Guzman v. Western State Bank*, 516 F.2d 125 (8th Cir. 1975); *Briere v. Agway, Inc.*, 425 F. Supp. 654, 659 (D. Vt. 1977); *Hutchinson v. Bank of North Carolina*, 392 F. Supp. 888, 895 (M.D.N.C. 1975) ; *Stuckers v. Thomas*, 374 F. Supp. 178, 182 (N.D. Ill. 1974); *International State Bank v. Gamer*, 281 N.W.2d 855, 858 (Minn. 1979); *First Bank Western Montana v. Gregoroff*, 770 P.2d 512 (Mont. 1989); *Thompson v. De Hart*, 530 P.2d 272 (Wash. 1975).

Ownership of real estate in which the attaching plaintiff has no prior interest does not present such exigent circumstances. *Garrison Memorial Hospital v. Rayer*, 453 N.W.2d 787 (N.D. 1990); *Olson v. Ische*, 330 N.W.2d 710, 712 (Minn. 1983).

Unless the exigent circumstances of Conn. Gen. Stat. § 52-278e(a)(2) are present, the property owner should have prior notice and opportunity to be heard before being deprived of the fundamental right to own, use and dispose of his real property. In the absence of exigent circumstances, Connecticut's PJR statute does not adequately minimize the risk of abuse or of the wrongful deprivation of property. *Mitchell*, 416 U.S. at 609-10.

Additional safeguards to deter wrongful attachment are essential, and readily available. The most important are advance notice and opportunity to be heard and a bond to deter an overzealous plaintiff from attaching in a doubtful case and to make the defendant whole promptly in the event of wrongful attachment. Because these are missing, the statute cannot stand.

The governmental interest at stake. The state has no legitimate interest in seeing that one of the parties to a private lawsuit is burdened with an impaired adversary position. *Fuentes*, 407 U.S. at 79, 81; *First Alabama Bank v. Parsons Steel*, 825 F.2d 1475, 1483 (11th Cir. 1987); *Traughber v. Beauchane*, 760 F.2d 673, 680 (6th Cir. 1985); *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983). Indeed, quite the reverse is true: The state's overwhelming interest would seem to favor maintaining public faith in the impartiality of the court system, by not taking sides:

> Finally, society may suffer what might be termed a "justice cost." Because attachment can work an extreme hardship on debtors, the availability of the attachment remedy gives enormous leverage to creditors. The threat of attachment may induce a debtor to settle at a higher figure than he otherwise would. Although overcrowded court dockets may make out-of-court settlements seem more beneficial, debtors should not be coerced into these settlements. The sense of fair play that must be inherent in our judicial system is diminished when creditors are given such an overwhelmingly strong weapon, particularly when that weapon is available prior to any judgment on the merits. *Thus, in addition to the economic costs, the traditional attachment procedure represents a substantial*

> *cost by making the judicial system party to a procedure that may operate unjustly.*

Zaretsky, *Attachment Without Seizure: A Proposal for a New Creditors' Remedy*, 1978 U. Ill. L.F. 819, at 837 (emphasis added).

Moreover, the attaching plaintiff has no existing property right in the premises which the state might have an interest in protecting, such as a mechanic's lien, mortgage, or a dispute over title. *See* Justice Powell's concurring opinions in *Mitchell*, 416 U.S. 628 n.3, and *Di-Chem*, 410 U.S. at 609; *see also Douglas Research and Chemical, Inc. v. Solomon*, 388 F. Supp. 433 (E.D. Mich. 1975).

The state also has no interest in interfering with the obligations of contract, by converting an unsecured debt to a secured debt when the creditor has not contracted for security in the event of default. *Seattle Credit Bureau v. Hibbitt*, 7 Wash. App. 219, 499 P.2d 92 (Wash. 1972) (action on contract not so truly unusual as to dispense with prior notice and opportunity to be heard). In a contract action, as in a tort action, the defendant may have defenses and counterclaims: payment (computers aren't always right, as this Court recognized in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978)); defective merchandise or workmanship; nondelivery; fraud (*e.g.* Ponzi schemes, time shares); violation of statute which renders the obligation void (Connecticut has such statutes regarding real estate commissions, home solicitation sales, home improvement contracts, and pyramid sale schemes); failure to resell repossessed goods in a commercially reasonable manner; usury; and others. *See generally* National Consumer Law Center, *Sales of Goods and Services* (2d ed. 1989).

Furthermore, contrary to amici's speculation, there is no difference in interest rates or the availability of credit between states which have, and have not, restricted creditor remedies. FTC Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7779-81 (1984). *See also*, Shuchman, *Data on the Durrett Controversy*, 9 Cardozo L. Rev. 605, 606-07 (1987). As Shuchman asserts, "[L]awyers acting as advocates . . . should provide the available empirical evidence as part of a full presentation of their case, whether in a courtroom or before a legislative body." *Id.* at 640. Amici have provided no data to show that credit is more available, or available at a lower cost, in Connecticut than in other states because of its peculiar PJR statute. Nor have they even suggested that Connecticut homeowners get a better rate on unsecured credit cards than do apartment dwellers because of the PJR. Numerous factors other than the availability of a PJR remedy (such as the rate of funds) predominate in credit decisions. *See* 49 Fed. Reg. at 7781.

The state has no justifiable interest in pursuing real property owners as a class. *Bay State Harness Horse Ass'n v. P.P.G. Ind.*, 365 F. Supp. 1299, 1306 (D. Mass. 1973); *Gazzola v. Clements*, 120 N.H. 25, 411 A.2d 147, 151-52 (N. H. 1980). Property owners, the tax-paying backbone of municipal government, are more likely than non-property owners to be solvent and able to pay their debts.

The state's purported interest in assuring that property owners will be able to pay future judgments is especially weak in this case, which involves an alleged assault and battery. A study of tort cases by the Connecticut Judicial Department concluded, "The vast majority of

[tort] cases are disposed by settlement or other method." In other words, no PJR was needed in the vast majority of tort cases, because either the plaintiff withdrew or the defendant paid. Jackson, Superior Court of Connecticut Tort Jury Trial Study 8 (1987) (available at Library, National Center for State Courts).

The study discloses that of over 11,000 tort cases concluded in a two year period, only 2.9% went to jury trial, and the defendant won in about half those cases. "Defendants won non-vehicular tort trials 59% of the time. . . . " *Id. at iv.* At best, then, the state's PJR procedure protects a potential tort judgment in only 1½% of all tort cases, even assuming that all those defendants had real property to attach.

A much earlier study reached similar results. Clark, *Research in Law Administration*, 2 Conn. B.J. 211 (1928). Non-vehicular tort judgments entered for the plaintiff in 35 cases, and for the defendant in 48 cases. For assault and battery, there were 18 judgments for plaintiff, 11 for defendant, 21 cases withdrawn, and 40 discontinued. *Id.* at 219.

The author's comments on prejudgment attachments confirm a longstanding pattern of abuse: "The effect of the harsh remedy of attachment, whereby the defendant's property may be taken at the beginning of the suit to be held to answer to an ultimate judgment, if granted, is brought out, apparently justifying the inference that excessive attachments are not unusual. . . . Almost 85 per cent of these cases [those withdrawn or settled] would, therefore, seem to be cases where the parties use the

court machinery to spar for position in order to effect a compromise." *Id.* at 212-13.

The lack of a government interest is one reason why *Sniadach* invalidated an ex parte seizure in a private dispute: "[I]n the present case, no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual conditions." 395 U.S. at 338. The absence of any government interest is underscored by the fact that restricting ex parte prejudgment attachments, where they are allowed at all, to emergency situations is the norm in this country; Connecticut is the only state which has the type of ex parte attachment statute challenged herein.

Finally, under *Mathews*, the Court must assess the potential administrative burdens imposed by the additional protections. Although petitioners and amici claim that this is a real concern, the scheme they propose is actually *more* cumbersome than the one the Constitution requires. At present the statute, according to petitioners, requires an ex parte attachment proceeding carefully supervised by a judge, *and* then a full postdeprivation adversary hearing at the request of the party subjected to the attachment. On the other hand, what respondent contends the Constitution requires is *one* adversary hearing, held before the attachment issues rather than the two-step process urged by petitioners.

To the extent that a predeprivation hearing imposes more burden on the State than the one petitioners embrace, it can only be because the present system discourages legitimate challenges to wrongful ex parte

attachments. Although that result may serve amici's purposes, it is obviously not legitimate for a State to use its sovereign power to help a prejudgment plaintiff pressure a property owner to pay a debt which may be disputed.

While the State does have an interest in seeing that valid claims are made and pursued, that interest is not advanced by the present statutory scheme which encourages abusive use of ex parte attachments. This legitimate interest would be advanced by pre-attachment notice and hearing, which also reduce the risk of erroneous deprivation in accordance with due process.

III. ESSENTIAL DUE PROCESS SAFEGUARDS INCLUDE A PLAINTIFF'S BOND

Due process requires that any deprivation of property be accompanied by procedures designed to minimize the risk of wrongful deprivation. *Mitchell*, 416 U.S. at 609, 618. "[A] party invoking the powers of a court of justice is [properly] required to give that security which is necessary to prevent its process from being used to work gross injustice to another." *McMillen v. Anderson*, 95 U.S. 37, 42 (1877). "[O]ne purpose in requiring a security as a condition to provisional relief is the fear that provisional relief, necessarily given after an attenuated hearing or none at all, is especially prone to error. . . . " Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C.L. Rev. 1091, 1093 (1974). *Cf.* Fed. R. Civ. P. 65(c).

"Before the system subjects itself and the defendant to risks of unfair adjudication, it is appropriate to ask the plaintiff to accept some risks himself. . . . [T]he inhibition

resulting from fear of ultimate liability is desirable rather than undesirable for the party who asks the court to subject a defendant to its orders without hearing the defendant's side of the case." *Id.* at 1114.

Thus, in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), the Court repeatedly emphasized that the statute required the creditor to file a sufficient bond with the court to compensate for wrongful attachment, 416 U.S. at 608, 610, 617, 618, 619, so that "the prevailing party is protected against all loss." *Id.* at 619.

Because a plaintiff's bond minimizes the risk of a wrongful attachment, *Mitchell*, 416 U.S. at 610; *Fuentes* v. *Shevin*, 407 U.S. 67, 83 (1972), both the dissenting and concurring opinions in *Di-Chem*, 419 U.S. at 611, 619 (and presumably therefore the entire Court), were of the view that adequate security is an essential element of due process.

Since *Mitchell* and *Di-Chem*, courts and commentators have consistently viewed the plaintiff's bond as an essential element of prejudgment attachment of property. *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1493 (8th Cir. 1987) ("Clearly, the centrality of an adequate bond for the protection of the debtor was well established by 1975."); *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1002 (11th Cir. 1987) ("A reasonable person would have known that an attachment accomplished without [a bond] was clearly unconstitutional."), *modified on other grounds en banc*, 851 F.2d 1321 (11th Cir. 1988); *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1130 (3d Cir. 1976); *United States v. Vertol H21C Reg. No. N8540*, 545 F.2d 648, 652 (9th Cir. 1976); *Mississippi Chemical Corp. v.*

Chemical Const. Corp., 444 F. Supp. 925, 941 (S.D. Miss. 1977) (bond is, however, no substitute for a hearing); *Aaron Ferer & Sons Co. v. Berman*, 431 F. Supp. 847, 852 (D. Neb. 1977); *United States General, Inc. v. Arndt*, 417 F. Supp. 1300, 1312 (E.D. Wis. 1976); *Terranova v. Avco Financial Services*, 396 F. Supp. 1402 (D. Vt. 1976) (real property attachment); *Douglas Research and Chemical, Inc. v. Solomon*, 388 F. Supp. 433, 437 (E.D. Mich. 1975); *Searles v. First Nat. Bank*, 127 Ariz. 240, 619 P.2d 749, 754 (1980); *McCrory v. Johnson*, 296 Ark. 231, 755 S.W.2d 566, 569 (1988); *Bernhardt v. Commodity Option Co.*, 187 Colo. 107, 528 P.2d 919 (1974); *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 382, 362 A.2d 778 (1975); *Unique Caterers, Inc. v. Rudy's Farm Co.*, 338 So. 2d 1067 (Fla. 1976); *Stoller Fisheries, Inc. v. American Title Ins.*, 258 N.W.2d 336, 345 (Iowa 1977); *Hillhouse v. Kansas City*, 221 Kan. 369, 559 P.2d 1148, 1153 (1977); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222, 231 (1976); *M.W. Ettinger, Inc. v. Anderson*, 360 N.W.2d 394 (Minn. 1985); *International State Bank v. Gamer*, 281 N.W.2d 855, 858 (Minn. 1979); *Peebles v. Clement*, 63 Ohio St. 2d 314, 408 N.E.2d 689 (Ohio 1980); *Callen v. Sherman's, Inc.*, 92 N.J. 114, 455 A.2d 1102 (1983); *Sharrock v. Dell Buick*, 45 N.Y.2d 152, 164 (1978); *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App. 1974) (bond doesn't substitute for prior notice and hearing); *E.g.*, 1A P. Coogan, W. Hogan & D. Vagts, *Secured Transactions* § 8.03[1.1] at 885 (1980); Keenan, *Due Process, Garnishment and Attachment*, 1987 S. Dak. L. Rev. 264, 276; Clarkson, *Creditors' Prejudgment Remedies and Due Process of Law*, 12 Conn. L. Rev. 174, 203 (1979); 2 R. Rotunda, J. Nowak & J. Young, *Constitutional Law* § 17.9 at 287 (1986).

Therefore, most attachment statutes require a plaintiff's bond to pay damages in the event judgment is for the defendant, or if the attachment is vacated for any other reason. Comment, *Attachment Statutes*, 38 Yale L.J. 376, 379 (1928); Annotation, *Wrongful Attachment – Damages*, 45 A.L.R. 2d 1221 (1956). Connecticut's current statute doesn't require a bond, although historically there was such a requirement. 1796 Statutes of Connecticut 24; 1838 Statutes of Connecticut 42.[5]

"[T]he need for a bond seems most urgent in the ex parte situation since it is just such a situation that the defendant is least able to present his case and the opportunity for abuse and need for protection are most critical." Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333, 338 (1959). Without a plaintiff's bond, Connecticut's statute "affords ample opportunity for abuse." *Attachment Statutes, supra*, 38 Yale L. J. at 378. *See also* Clark, *Research in Law Administration*, 2 Conn. B.J. 211, 212-23, 230 (1928).

In Connecticut, a plaintiff can attach with impunity, and thus place all the burden of affirmative action and expense on the defendant. Without a bond, there is no risk to a plaintiff which causes him to think twice before attaching a defendant's property. Indeed, before the decision of the Second Circuit below, plaintiffs routinely sought attachment, without allegation of need or exigent

[5] Even a bond would not protect the defendant if the attachment is excessive, as it is in this case; "thus a creditor with a valid debt of disputed size can gain significant leverage in dealing with a debtor with little fear of reprisal." Comment, *Attachment*, 22 Stan. L. Rev. 1254, 1261 (1970).

circumstances, in every case where the defendant owned real property. In her Petition for Rehearing below, the Attorney General estimated that 300-400 new ex parte real estate attachments were granted every week in Connecticut. Brief on Petition at 14.

While respondent believes that a counterclaim for wrongful attachment is inadequate as a substitute for the security of a bond, there is no such remedy for wrongful attachment in Connecticut. An attachment is wrongful simply when it is dissolved. *Newby v. United States Fidelity and Guaranty Co.*, 49 Wash. 2d 843, 307 P.2d 275 (1957); *Braun v. Pepper*, 224 Kan. 56, 578 P.2d 695, 699 (1970). In most states, to recover for simple wrongful attachment, the defendant need not show malice or want of probable cause. *Newby*, 307 P.2d at 277; *Braun*, 578 P.2d at 699; Cobbey, *Replevin* § 1278 (2d ed. 1900).

But in Connecticut, the only possible remedy entails both bringing a separate action, and proving that the attachment was without probable cause. A postdeprivation remedy for wrongful attachment is constitutionally inadequate where the only remedy is an independent tort action – a lengthy and speculative process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982).

Until 1986, Connecticut's only remedy for wrongful attachment was an action for vexatious litigation. Petitioners argue that, since 1986, another remedy has been available: a statutory claim under Conn. Gen. Stat. § 52-568(a)(1), providing for double damages if a person commences and prosecutes an action, without probable cause. That remedy is unrealistic, for several reasons.

First, because Connecticut rules of practice do not permit a counterclaim unless it arises out of the transaction alleged in the complaint, *Guild Equities, Inc. v. Harris*, 3 Conn. Cir. 218, 210 A.2d 459 (App. Div. 1965); *Springfield-Dewitt Garden, Inc. v. Wood*, 143 Conn. 708, 713, 125 A.2d 488 (1956) (cannot assert tort counterclaim in contract action), such a statutory claim must, as a general rule, be brought as a separate action, causing the attached party to incur additional expenses (filing fee, sheriff's fee, attorney's fee).

More specifically, Connecticut law is clear that the attached defendant simply cannot raise the § 52-568 claim in the underlying lawsuit. *Blake v. Levy*, 191 Conn. 257, 263-64, 464 A.2d 52 (1983); *Vandersluis v. Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978); *Shaefer v. O.K. Tool Co.*, 110 Conn. 528, 530-31, 148 Atl. 330 (1930); *Johndrow v. Architects Bldg. Co.*, 2 CT. L. Rptr. 111 (Conn. Super. Ct. 1990). The underlying lawsuit must have terminated in order to proceed, because to allow a vexatious litigation counterclaim in the underlying action, according to the Connecticut Supreme Court, would chill the presentation of honest but uncertain causes of action.

Second, in many cases, as in this case, an independent judicial official has already made a pro forma finding of probable cause, even though the statute does not literally require such a determination. *Compare* Conn. Gen. Stat. § 52-278d *with* § 52-278e(c). While that independent finding of probable cause is not conclusive, it can be rebutted only by evidence that the judge's decision was procured by fraud, perjury, misrepresentation, or falsification of evidence, not simply by showing that the defendant prevailed in the underlying action. *Solitro v. Moffatt*, 523 A.2d

858, 863 (R.I. 1987). Thus, it is highly unlikely that, after a judicial finding of probable cause, an attached defendant will be able to show absence of probable cause.

Third, another barrier to recovery for wrongful attachment in the subsequent action is the difficulty of proving that the underlying action was brought without probable cause. Probable cause is merely a subjective belief that the attaching plaintiff had a claim. Probable cause "does not demand that a [plaintiff's] belief be correct or more likely true than false." *Anderson v. Nedovich*, 19 Conn. App. 85, 88 (1989).

Fourth, an attorney's advice that there is probable cause to begin an action is a complete defense, even if counsel's advice was unsound or erroneous. *Vandersluis*, 176 Conn. at 361; *H.B. Associates, Inc. v. Joaquim*, 2 CT. L. Rptr. 447 (Conn. Super. 1990); *Stewart v. Sonneborn*, 98 U.S. 187, 196 (1878); *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988).

Finally, and most fundamentally, whether by counterclaim or otherwise, a wrongful attachment claim cannot make up for a lack of due process: the failure to provide a meaningful hearing at a meaningful time. Nor can this postdeprivation remedy perform the function of a bond, which is to *promptly* make whole the victim of the wrongful attachment.

In contrast, a bond would permit the defendant to recover, usually in the same action, if the attachment is dissolved for any reason. *Russell v. Farley*, 105 U.S. 433, 437-47 (1881); *Blumenthal v. Merrill Lynch*, 910 F.2d 1049, 1054 (2d Cir. 1990); Cobbey, *Replevin* §§ 676, 1269 (2d ed. 1900).

Connecticut doesn't provide for a bond. The defendant's speculative remedy of bringing additional, costly, highly doubtful litigation, provides no deterrence to an attaching plaintiff. Thus, in failing to minimize the risk of erroneous deprivation, the Connecticut statute violates due process.

CONCLUSION

Respondent respectfully requests that this Court affirm the decision below on the opinion of Judge Pratt.

Respectfully submitted,

JOANNE S. FAULKNER
(Counsel of Record)
123 Avon Street
New Haven CT 06511
(203) 772-0395

BRIAN WOLFMAN
ALAN B. MORRISON
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington D.C. 20036
(202) 785-3704

Attorneys for Respondent

Dated: December 17, 1990